

1 POSTED ON WEBSITE

2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 FRESNO DIVISION

6 In re) Case No. 13-13156-B-7
7)
8 Roberto Martinez Salgado and)
9 Sandra Mata Espinoza,)
10 Debtors)
_____)

11 **MEMORANDUM DECISION REGARDING CHAPTER 7**
12 **TRUSTEE’S APPLICATION FOR PAYMENT OF EXPENSES**

13 The chapter 7 trustee, James Salven (the “Trustee”), has filed an
14 Application for Payment of Final Fees and Expenses (Doc. No. 28; the
15 “Application”). The Application was not noticed or set for hearing and no
16 objection has been filed to the Application. However, the court has an
17 independent duty to review the Application and make sure it complies with the
18 Bankruptcy Code and applicable rules.

19 This memorandum decision contains the court’s findings of fact and
20 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
21 applicable to this contested matter by Federal Rule of Bankruptcy Procedure 7052
22 and 9014. The court has jurisdiction over this matter pursuant to 28 U.S.C.
23 § 1334, 11 U.S.C. § 522, and General Order Nos. 182 and 330 of the U.S. District
24 Court for the Eastern District of California. This is a core proceeding as defined in
25 28 U.S.C. § 157(b)(2)(A), (B), (E) and (O).

26 Based on the Trustee’s final report (“TFR”), it appears that the Trustee
27 recovered one asset, the Debtors’ 2013 tax refund, which was listed on Schedule B
28 in an unknown amount but from which the Trustee recovered and administered

1 \$6,253.74.¹ For his services, the Trustee is requesting fees in the amount of
2 \$655.93, and reimbursement of expenses in the amount of \$553.58 (the
3 “Expenses”). The court did not question the “fee” portion of the Application and
4 the request for fees is not at issue here.² However, the court had concerns about
5 the Trustee’s request for reimbursement of expenses. The court therefore issued
6 an order setting the Application for a hearing. In response, the Trustee filed a
7 supplemental declaration in an effort to explain some of the expenses listed in the
8 Application (the “Supplemental Declaration”). The Trustee offered to withdraw
9 two of the expense line items. After the hearing, the court approved the
10 Application insofar as it related to the Trustee’s fees, in the amount of \$655.93.
11 (See Doc. No. 40.) The court took under submission the Trustee’s request for
12 Expenses in the amount of \$553.58. For the reasons set forth below, the court is
13 compelled to deny the Application insofar as it requests reimbursement of the
14 Expenses.

15 **Background.** The case was filed April 30, 2013. On June 6, 2013, the
16 Trustee concluded the meeting of creditors and filed a notice of assets.
17 Subsequently, two unsecured claims based on credit card debt were filed for a total
18 of \$1,355.95. On July 8, 2013, the court granted the Trustee's motion to employ a
19 broker to sell the Debtors' home, however four days later the Debtors filed
20 amended schedules exempting the equity in their home and leaving their 2013 tax
21 refund nonexempt. The only other action on the docket since then has been the
22

23
24 ¹Based on the TFR, the Trustee paid two unsecured claims in full totaling
25 \$1,355.95. Surplus funds in the amount of \$3,688.28 (after a reserve for administrative
expenses) were returned to the Debtors.

26 ²The formula for calculating a trustee’s fee under § 362(a) is based on “all
27 moneys disbursed or turned over in the case by the trustee to parties in interest,
28 excluding the debtor, but including holders of secured claims.” Ironically, chapter 7
trustees universally construe “all moneys disbursed to parties in interest” to include the
money they disburse to themselves and to their professionals which means they get a
fee for paying themselves a fee and reimbursing themselves for expenses.

1 entry of the Debtors' discharge on August 8, 2013. This case was held open for
2 nearly two years while the Trustee administered the Debtors' 2013 tax refund and
3 paid two creditors. Most of the money recovered by the Trustee will be returned to
4 the Debtors. (*See* footnote 1, *supra*.)

5 **The Trustee's Application for Expenses.** The court has two concerns
6 with the Expenses. The first relates to the Trustee's practice of averaging and
7 estimating his Expenses. The second relates to the Trustee's practice of charging
8 the estate for items which appear to be the normal overhead costs of running his
9 office and doing business.³ As the court recognized in *Sousa v. Miguel (In re U.S.*
10 *Trustee)*, 32 F.3d 1370 (1994), the category of reimbursable expenses is broad.
11 The court, quoting *Collier (2 Collier on Bankruptcy* (15th Ed.) ¶ 330.06),
12 explained,

13 [T]he scale of expenses allowable to trustees may range from the rent
14 indispensable to secure preservation of the debtor's assets to the cost
15 of prizes, barbecue, music and other publicity designed to attract a
16 crowd and induce it to buy what the trustee is anxious to sell. It will
17 cover expenditure incident to an authorized conducting of a business,
such as rent, insurance, salaries, wages, costs of merchandise and
production, royalties and taxes. In addition, expenses of
investigation, litigation, arbitration, settlement and traveling come
within the coverage of section 330.

18 *In re U.S. Trustee*, 32 F.3d at 1336-37.

19 "This description of expenses illustrates that trustees are entitled to reimbursement
20 for expenses incurred in the administration of a specific estate, not what they
21 generally spend to run their office. *Id.*

22 *In re U.S. Trustee* cites *In re Williams*, 102 B.R. 197, 199 (Bankr. N.D.Cal.
23 1989), where that court explained that "an expense is not 'actual,' and therefore
24 not reimbursable under section 330(a)(2), to the extent that it is based on any sort
25 of guesswork, formula, or pro rata allocation. Concrete documentation, in the
26

27
28 ³The court notes that the Trustee is also a licensed CPA who frequently provides
professional accounting services to other chapter 7 trustees in cases before this court.

form of receipts and invoices, is therefore necessary to support any application for reimbursement.” *Id.* at 1376, fn 3.

The Application listed the Expenses thus:

Trustee Expenses

TFR(120) and TDR(60)-est. copy cost (180@.164))	1 @ \$29.52	\$29.52
Distribution(postage, letter, envelope)	2 @ \$0.69	\$1.38
COPIES	185 @ \$0.17	\$30.53
OTHER	1 @ \$400.00	\$400.00
DOCKET	1 @ \$5.00	\$5.00
CLAIMS REGISTER	2 @ \$0.50	\$1.00
Est. Cost Record Retention (3 years) and Destruction	1 @ \$43.30	\$43.30
Est. Cost of Offsite Review TFR/TDR	1 @ \$42.85	<u>\$42.85</u>
Subtotal Expenses:		\$553.58
Plus Adjustment:		<u>\$0.00</u>
Total Expenses:		\$553.58
Less Previously Paid:		<u>\$0.00</u>
Total Expenses Requested:		\$553.58

In his Supplemental Declaration the Trustee endeavored to explain some of the Expenses and offered to withdraw two of them (\$405), specifically the Expenses identified as:

OTHER	1 @ \$400.00	\$400.00 and
DOCKET	1 @ \$5.00	\$5.00 ⁴

///

⁴The “Other” Expense was described as reimbursement for \$400 he paid to the realtor for a market analysis of the Debtors’ residence prior to the realtor’s employment by the court. The “Docket” Expense was described simply as a “hold over from the past.”

1 In addition, the Trustee described the “[c]harge for record retention” as “the
2 *estimated cost* of storage unit (for three years) divided by *estimated number* of
3 ‘asset’ cases during that period. Number has not changed despite downturn in
4 filings.” Likewise, he stated that the “[e]st. cost of Offsite Review is the *estimated*
5 *average charge* for sending report records for TFR and TDR to offsite review
6 locations. Review process changed from local to offsite.” In addition, he
7 explained, the “TFR and TDR is the *estimated paper cost* of producing the
8 reports.” Finally, “Copies represents, per review of files, the *estimated number of*
9 *copies* made during administration.” Thus, pursuant to *U.S. Trustee*, even if the
10 Expenses *were* proper, there was no documentation to support any of the
11 Expenses.

12 At the hearing Robert Hawkins (“Hawkins”) appeared on behalf of the
13 Trustee and with little discussion submitted the Application on the record.⁵
14 Hawkins acknowledged that applicable law in the Ninth Circuit does not allow
15 chapter 7 trustees to charge for estimated expenses and office overhead. With
16 regard to the \$42.85 Expense item identified as “Est. Cost of Offsite Review
17 TFR/TDR,” Hawkins explained that the chapter 7 trustee’s final reports (“TFRs”)
18 and distribution reports (“TDRs”) are no longer reviewed by the U.S. Trustee in
19 the local office, but in San Francisco.

20 **Section 330(a)(1)(B) Reimbursement of Expenses.** The issue of
21 reimbursable “actual, necessary expenses” under §330(a)(1)(B)⁶ was substantially
22

23 ⁵Hawkins is also a chapter 7 trustee who frequently files applications for fees
24 and expenses with this court. To this court’s best recollection, Hawkins has never
25 requested reimbursement for expenses of the kind and amounts at issue here, for the
administration of a relatively uncomplicated case.

26 ⁶Section 330(a)(1)(B) reads, in pertinent part: “(a)(1) After notice to the parties
27 in interest and the United States Trustee and a hearing, and subject to sections 326, 328,
and 329, the court may award to a trustee . . . (B) reimbursement for actual, necessary
28 expenses.”

1 settled in 1994 when the Ninth Circuit issued its ruling in *In re U.S. Trustee*. In
2 that case, the court put to rest the notion that a chapter 7 trustee's normal overhead
3 costs of operating his or her office could be "averaged" and allocated to each of
4 the trustee's pending asset cases. In addition, while *actual* documented
5 extraordinary office expenses may be reimbursable at the court's discretion, *id.* at
6 1375, *estimated* expenses are not reasonable necessary actual expenses and are not
7 reimbursable. *Id.* at 1373-74.⁷

8 In *U.S. Trustee*, the chapter 7 trustee liquidated the available assets for the
9 benefit of the creditors, after which he filed his final report for court approval. The
10 trustee requested, *inter alia*, reimbursement of expenses listed as follows:

11	Postage and meter rental	\$22.75
12	Pacific Telephone	12.80
13	Mileage	9.60
14	Stationery and supplies	33.25
15	Office and equipment	105.00
16	Clerical and steno services	230.00
17	Copies	<u>18.60</u>
18	Total	\$432.00

19 *Id.* at 1371.

20 The trustee acknowledged that he did not contemporaneously document
21 expenses. Instead, he calculated the expenses by using actual and historical data,
22 divided the different costs to arrive at an average, and then allocated that amount
23 to each asset case. For example, the trustee computed the "postage meter rental"
24 charge for a specific case by taking his total monthly rental cost, dividing it by the

25 ⁷Notably, the United States Trustee ("UST") vigorously objected to the chapter
26 7 trustee's expenses in *In re U.S. Trustee* and vigorously prosecuted a successful
27 appeal. Here, the UST has taken no position for or against the Trustee's Application
28 and request for Expenses. It appears, as the court recently noted in *In re Scoggins*, 517
B.R. 206 (Bankr. E.D. Cal. 2014), that the UST has abandoned virtually all
responsibility for supervising the compensation which her own trustees are charging to
their bankruptcy estates. The UST has essentially punted that responsibility to the
parties and to the courts. *Id.* at 215-221.

1 average number of asset cases, and multiplying that figure by the number of
2 months the case was open. Likewise, “Pacific Telephone” charges were
3 determined by dividing the amount of the monthly bill by the number of calls
4 made to arrive at a per-call amount, then multiplying the number of documented
5 and *estimated* calls made in each case. As for “mileage” expenses, the trustee
6 computed the mileage per month on his car, divided that by the number of asset
7 cases, and then multiplied the miles by the number of months the case was open.⁸
8 *Id.* at 1371.

9 Here, it appears from the record that the Trustee has calculated his
10 Expenses in a similar manner, the practice that was expressly prohibited in *U.S.*
11 *Trustee*.⁹ In addition, the Trustee’s Expenses appear to include normal overhead
12 expenses that would be prohibited by the *In re U.S. Trustee* decision, even if they
13 applied specifically to this particular case.

14 The TFR and TDR copy costs are, both, an overhead cost of doing business
15 as a chapter 7 trustee, and are estimated, as are the costs of record retention and
16 destruction, and of “Offsite Review” of the TFR and TDR. The “claims register”
17 expense is unexplained, however the court notes that other trustees’ applications
18 for expenses do not include such an expense. The \$30.53 Expense item listed as
19 [C] “COPIES” was explained in the Supplemental Declaration as the Trustee’s
20 *estimate* of the number of copies that were made for internal purposes in the

21 ///

22 ///

24
25 ⁸The trustee even expensed the cost of his office space in this manner, adding
26 the monthly costs of his office rent, insurance costs, utilities, cleaning service, and
alarm system, dividing the number by the pending asset cases and charging that amount
to the case each month the case was open.

27 ⁹The court is holding several applications from this Trustee, that include similar
28 kinds of costs which are not normally included on applications from other chapter 7
trustees, pending resolution of this matter.

1 course of administering the case. Clearly these are problematic on both grounds,
2 as *estimated expenses* and as *office overhead*.

3 The Expenses requested here are extraordinary when compared to the
4 expenses routinely requested by virtually every other chapter 7 trustee in the
5 Eastern District. Most applications for expenses are in the double, not triple digits.
6 Indeed, many of the applications the court has reviewed from chapter 7 trustees in
7 the Sacramento Division make no request for reimbursement of expenses. A
8 review of recent expense applications pulled at random in equal numbers from all
9 chapter 7 trustees in the Eastern District shows expenses ranging in amounts from
10 \$0 (22 of the 130 applications reviewed) to \$1,989.90 (Salven). The average
11 expense request in the applications reviewed by this court is \$173.43.

12 **Conclusion.**

13 The Expenses for which the Trustee requests reimbursement are either
14 estimated, or part of the cost of overhead, or both. In addition, no documentation
15 was submitted in support of any of the expenses. Therefore, the Application as it
16 relates to the Trustee's request for reimbursement of Expenses will be denied.

17 Dated: July 2, 2015

18
19
20 /s/ W. Richard Lee
21 W. Richard Lee
22 United States Bankruptcy Judge
23
24
25
26
27
28